91-472

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DORIS STAMEY
Petitioner,

vs.

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
Respondent.

PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

When a willful violation has been found by the jury in an action under the Age Discrimination in Employment Act of 1967, do back pay and liquidated damages continue until there has been an appropriate award of equitable relief made by the district court? When a district court award of equitable relief in the form of reinstatement is vacated by the appellate court as inappropriate, do back pay and liquidated damages awarded by the jury continue to run until an appropriate award of equitable relief has been made by the district court on remand?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner Doris Stamey as plaintiff appellant, and Respondent Southern Bell Telephone and Telegraph Company as defendant appellee.

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No. _____

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DORIS STAMEY
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Doris Stamey respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceedings on April 10, 1991.

OPINIONS BELOW

The April 10, 1991 per curiam opinion of the Eleventh Circuit is not reported. It is reprinted at Appendix A hereto. The Eleventh Circuit's June 17, 1991 order denying rehearing en banc is reprinted at Appendix B. The district court's order and judgment entered on May 29, 1990, which forms the basis of the questions presented in this Petition, is reprinted at Appendix C.

The earlier opinion of the Eleventh Circuit, which remanded this case to the district court to determine the matters addressed in its May 29, 1990 order is reported at 859 F.2d 855.

JURISDICTION

Petitioner brought suit in the United States District Court for the Northern District of Georgia on December 6, 1983, under the *Age Discrimination in Employment Act of 1967*, as amended, 29 U.S.C. §621 *et. seq.* (the "ADEA"). Petitioner alleged federal jurisdiction under the ADEA, and 28 U.S.C. §§ 1331, 1332.

The judgment or decree sought to be reviewed is an unpublished opinion entered by the Eleventh Circuit on April 10, 1991 (App. A.), which summarily affirmed the judgment of the district court entered on May 29, 1990. Petitioner's motion for rehearing and suggestion for rehearing en banc was denied on June 17, 1991.

The jurisdiction of this court to review the decision of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1) (1982).

STATUTE INVOLVED IN THIS CASE

The statute which is involved in the petition is the remedy provision of the ADEA, 29 U.S.C. §626(b) which provides in relevant part as follows:

> Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as

> amended (29 U.S.C. 216, 217) [29 U.S.C.S. §§216, 217]: Provided, that liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

The specific issue raised by this petition involves the interplay when "amounts owing" [back pay] and liquidated damages are awarded by a jury, and subsequent equitable relief is awarded by the court.

STATEMENT OF THE CASE

On December 6, 1983, Petitioner Doris Stamey commenced this age discrimination action in the United States District Court for the Northern District of Georgia, Atlanta Division, against her former employer, Southern Bell Telephone and Telegraph Company. In her complaint, Stamey, a nonmanagement employee, alleged that Southern Bell had failed to promote her, had retaliated against her, had failed to pay her for management level work, and had ultimately fired her, all on account of intentional age discrimination.

This case proceeded to trial before a jury on August 19, 1985. At the conclusion of Stamey's case in chief, Southern Bell moved for a directed verdict on all of her claims. The district court granted Southern Bell's motion on Stamey's promotion claim on the basis that Stamey had not shown

that an actual promotion had occurred during the 180 day period that preceded Stamey's charge of age discrimination. The remaining claims were submitted to the jury. On August 23, 1985, the jury returned its verdict finding that Southern Bell had willfully violated the ADEA on all counts. Back pay was awarded by the jury. Because the jury also found that Southern Bell's conduct had been willful, the district court subsequently awarded liquidated damages equal in amount to the jury's back pay award. The issue of equitable relief had been reserved for determination by the district court after verdict and judgment.

After judgment was entered on the jury verdict, Stamey moved to amend the judgment to include an award of equitable relief. A ruling on Stamey's request for equitable relief was delayed by Southern Bell's motion for judgment n.o.v, or for a new trial. After denying those motions, in an order entered on June 23, 1986, the district court ordered Stamey reinstated, but only to a nonmanagement position. The district court agreed with Southern Bell's position that reinstatement to management was not required because it had directed a verdict on Stamey's promotion claim. Because the entire thrust of her lawsuit was the contention that she had been performing management work, and had indeed trained the managers hired to assume her job responsibilities, Stamey declined that offer. In an order entered on March 24, 1987, the district court denied Stamey's motion for reconsideration of the court's order of equitable relief. It found Stamey to have effectively retired on July 23, 1986 when she declined reinstatement to a nonmanagement position. However, in what may be described as

inconsistent logic, the district court in the same order awarded Stamey back pay and liquidated damages at a management level through July 23, 1986 because of the jury's determination that she had been performing management level work. Stamey appealed the district court's decision on equitable relief. Southern Bell appealed the judgement entered on the jury verdict.

In an opinion dated November 4, 1988, the United States Court of Appeals for the Eleventh Circuit affirmed the judgment entered on the jury verdict, but reversed the district court's order which granted Southern Bell's motion for a directed verdict on Stamey's promotion claim. The Eleventh Circuit also held that the district court's award of equitable relief was erroneous, stating that Stamey's "refusal of the reinstatement Bell offered would not be 'unreasonable' and her salary should not have been discontinued." *Stamey v. Southern Bell Telephone & Telegraph Company*. 859 F.2d 855, 863 (11th Cir. 1988). The appeals court remanded the case back to the district court to decide whether Stamey should be reinstated to a management position, or "whether monetary damages are sufficient." *Id.*

On May 29, 1990, the district court entered its final order on remand. As an equitable remedy, the district court awarded plaintiff the salary she would have received at a management level from July 23, 1986, the last day of Southern Bell's back pay liability under the district court's March 24, 1987 order, and May 21, 1990, Stamey's sixty-fifth birthday. The district court refused to award Stamey liquidated damages for the same period, and refused to award any prospective relief beyond the date of Stamey's sixty-fifth birthday. This petition is for a writ of certiorari

from the Eleventh Circuit's per curiam opinion which affirmed the district court's May 29, 1990 order.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The reason this petition for a writ of certiorari should be granted is to answer a pretty basic question about the ADEA remedy scheme that has never been directly addressed. Where there has been a jury verdict in favor of an aggrieved employee which found a willful violation of the ADEA, should back pay and liquidated damages continue until a legally acceptable award of equitable relief has been made? Of course, the question assumes there has been no reasonable equitable type relief offered by the employer during the interim.

Unlike Title VII, the ADEA mandates that all "amounts owing to a person as a result of a violation of this chapter" shall be doubled if the violation is found to have been willful. 29 U.S.C. §626(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The ADEA also contemplates an award of equitable relief to remedy any prospective loss occasioned by its violation. 29 U.S.C. §626(b); *see Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (11th Cir. 1988). The question then develops of how to treat the gap between the jury's award of "amounts owing" under 29 U.S.C. §626(b), and the court's postjudgment award of equitable relief, either by reinstatement or front pay?

Initially, the district court treated this gap period by awarding back pay and liquidated damages as required by the jury's verdict. However, after its initial award of

equitable relief was vacated by the Eleventh Circuit, the district court declined to award liquidated damages. Citing a footnote to a Title VII case, the district court offered the following explanation:

> The court has fulfilled the Eleventh Circuit mandate by awarding monetary damages to remedy defendant's failure to promote plaintiff. Plaintiff's efforts to double the monetary award simply by classifying it as back pay are fruitless. The Eleventh Circuit has stated that a period after remand may be classified as either "back pay" or "front pay." *See Nord v. United States Steel Corp,* 758 F.2d 1442 (11th Cir. 1985). Simply by naming the award "back pay" plaintiff seeks to double the remedy already deemed appropriate by this court. Appendix C, at 4.

Petitioner submits the district court's reasoning, as well as its reliance on the *Nord* footnote, are faulty. *Nord* was a Title VII case in which no issue of liquidated damages could possibly have been considered or addressed. Since liquidated damages were not an issue, it did not matter whether the court denominated the award as front pay or back pay. In an ADEA case, it does matter because Congress saw fit to include a mandatory award of liquidated damages when a willful violation has been found by the factfinder. *Trans World Airlines, Inc. v. Thurston, supra* at 624.

Petitioner submits that the correct rule in an ADEA case should be that when a willful violation has been found, back pay and liquidated damages continue to accumulate until there has been a legally permissible award of equitable relief. If the employer insists on litigating the issue of equitable relief, it should be made to

do so at its peril. The employer can stop the accumulation of back pay and liquidated damages anytime after verdict by making a "reasonable" offer of equitable relief. Then if the aggrieved person rejects that offer, he does so at his peril.

Several cases arising under other remedial legislation seem to have adopted Petitioner's view. In *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976) the Fourth Circuit cited the statutory objectives of employment discrimination legislation set out in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). To satisfy these objectives of eradicating discrimination and making its victims whole, the court explained that, "back pay must be allowed an employee from the time he is unlawfully denied a promotion until he receives it." 535 F.2d at 257. *See also EEOC v. Enterprise Associated Steamfitters Local No. 638*, 542 F.2d 579 (2d Cir. 1976). The same reasoning for deciding when to terminate the back pay period is set out in *B. Schlei & P. Grossman, Employment Discrimination Law*, Ch. 38, p. 1432 (2d ed 1983) as follows:

> The purpose of back pay is to monetarily compensate the discriminatee in the same manner in which the discriminatee would have been compensated had there been no discrimination, so that the discriminatee will neither suffer loss nor receive a windfall. Therefore, in the individual case, termination of the back pay period normally occurs when the discriminatee is unconditionally and in a bona fide fashion offered the employment, reinstatement, or promotion at issue. This can occur pursuant to a final court decree or pursuant

> to a voluntary bona fide offer of employment, reinstatement, or promotion to the position at issue. However, an offer of employment which is not bona fide will not terminate the back pay period.

These same principles should apply in an ADEA case, but they should not be interpreted to exclude liquidated damages when a willful violation has been found.

CONCLUSION

Petitioner does not believe that there has been a definitive ruling in an ADEA case on how liquidated damages, once mandated by a jury's verdict, should be treated during the interim between the verdict and the award of equitable relief. Indeed, in this very case the district court reached inconsistent conclusions on this issue in its March 24, 1987 and May 24, 1990 orders. Petitioner submits that liquidated damages should be required, but in any event submits that the Supreme Court should establish a uniform rule of law on this ADEA issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 90-8613

D.C. Docket No. 1:83-cv-2648-RHH

DORIS STAMEY
Plaintiff-Appellant,

vs.

SOUTHERN BELL TELEPHONE
& TELEGRAPH COMPANY

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(April 10, 1991)

Before FAY and EDMONDSON, Circuit Judges and GARZA*, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court is AFFIRMED.

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 90-8613

DORIS STAMEY
Plaintiff-Appellant,

vs.

SOUTHERN BELL TELEPHONE
& TELEGRAPH COMPANY

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 10, 11th cir., 1991, __F.2d__).

Before FAY and EDMONDSON, Circuit Judges and GARZA*, senior Circuit Judge.

PER CURIAM:

Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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* Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DORIS STAMEY	)	
Plaintiff,	)	
vs.	)	C83-2648A-RHH
	)	
SOUTHERN BELL TELEPHONE	)	
& TELEGRAPH COMPANY	)	
Defendant.	)	

ORDER

This action is currently before the court on plaintiff's motion for judgment.[1] On September 25, 1989, the court entered an order regarding matters of post judgment relief. On February 13, 1990, the court partially granted defendant's motion for reconsideration of the September 25, 1989 order. In accordance with these previously entered orders and with pertinent case law, the court now enters the following order to resolve the remaining disputed issues.

I. *The Eleventh Circuit Mandate*

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[1] Plaintiff has also filed a motion to allow her to file a reply brief to defendant's brief of March 22, 1990. The court GRANTS plaintiff leave to file a reply brief. The court has considered plaintiff's reply in ruling on plaintiff's motion for judgement.

The Court of Appeals for the Eleventh Circuit remanded the above-style action to this court on November 4, 1988. *See Stamey v. Bell Telephone & Telegraph*, 859 F.2d 855 (11th cir. 1988). Holding that this court erred in directing a verdict for defendant on plaintiff's failure to promote claim, the Eleventh Circuit:

> remand[ed) this aspect of the case to the district judge to determine whether Stamey at this point deserves reinstatement as a Chief Service Advisor or whether monetary damages are sufficient.

Id. at 863 . After reviewing the record, this court found that the appropriate remedy for Stamey was monetary relief rather than reinstatement. Order of September 21, 1989, p. 2. Accordingly, the court awarded Stamey monetary damages equaling a management level salary for the period between July 23, 1986 and May 21, 1995. The court subsequently determined on defendant's motion for reconsideration that Stamey should only receive a management level salary through May 21, 1990, the date on which Stamey reached the age of sixty-five.[2]

In her supplemental brief in support of her motion for judgment, Stamey again requests that the court award her management level salary through May 21, 1995, the date on which she will reach the age of seventy. The court declines the invitation to do so, and affirms the order of February 13, 1990.

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[2] On direct examination at trial, Stamey testified that had she remained at Southern Bell, she would have retired at age sixty-five.

The parties agree that the following schedule reflects the salary Stamey would have received had she worked in a management level position for Southern Bell through May 21, 1990.

EFFECTIVE DATE	BONUS	BASE PAY
7/23/86 - 4/1/87		$25,544.00
2/15/87	$1,400.00	
4/1/87 - 4/1/88		$38,300.00
2/15/88	$2,100.00	
4/1/88 - 4/1/89		$40,100.00
7/15/89	$1,600.00	
4/1/89 - 4/1/90		$41,300.00
2/15/90	$2,000.00	
4/1/90 - 5/21/90		$ 5,955. 00[3]
	$7,100.00	$151,199.00

Total: $158,299.00

Thus, the court finds that the monetary relief plaintiff should be awarded in accordance with the Eleventh Circuit's mandate is $158,299.00.

The parties disagree over whether the court should subtract from this amount $37,100.00 in pension benefits already received by plaintiff. The Third Circuit has refused to set off pension plan benefits from ADEA damages. *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987). However, the majority of circuits have held that benefits coming from the employer are not collateral and should be set off. *See*

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[3] Based on an annual salary of $43,158.00.

Guthrie v. J.C. Penney Co., Inc., 803 F.2d 202, 210 (5th Cir. 1986). This court finds that the $37,100.00 in pension benefits already paid to plaintiff by defendant should be deducted from the monetary relief of $158,299.00. Thus plaintiff's total award is thus $121,199.00.

Plaintiff states that the monetary award should characterized as back pay and doubled pursuant to the ADEA's liquidated damages provision. The court disagrees. The court has fulfilled the Eleventh Circuit mandate by awarding monetary damages to remedy defendant's failure to promote plaintiff. Plaintiff's efforts to double the monetary award simply by classifying it as back pay are fruitless. The Eleventh Circuit has stated that a period after remand may be classified as either "back pay" or "front pay". *See Nord v. United States Steel Corp.*, 785 F.2d 1462, 1474 n. 13. Simply by naming the award "back pay" plaintiff seeks to double the remedy already deemed appropriate by this court. In accordance with its earlier decisions, this court now awards plaintiff monetary damages in the amount of $121,199.00.

The court orders Southern Bell to adjust plaintiff's pension to reflect her net credited service date through May 21, 1990.

II. *Interest on Awards*

The court grants plaintiff post-judgment interest on the August 23, 1985 liquidated damages award in the amount of $23,552.98. The court also grants plaintiff $5,003.00 in post-judgment interest on the July 23, 1986 liquidated damages award. The court grants plaintiff pre-judgment interest on the monetary damages award of

$121,199.00 for the period of July 23, 1986 through the date of this order.

CONCLUSION

Plaintiff is awarded $121,199.00 plus interest on her failure to promote claim. Plaintiff is awarded $23,552.98 in post-judgment interest on her August 23, 1985 liquidated damages award. Plaintiff is awarded $5,003.00 in post-judgment interest on her July 23, 1986 liquidated damages award.

Southern Bell is directed to adjust plaintiff's pension to reflect plaintiff's net credited service date through May 21, 1990.

Plaintiff has twenty days from the date of this order in which to file her notion for attorney fees. Defendant is afforded ten days thereafter in which to respond. Plaintiff will have an additional ten days to file a reply if desired.

So ORDERED this 24 day of May, 1990.

ROBERT H. HALL
UNITED STATES DISTRICT JUDGE